ORIENTAL FINANCE BHD

v.

SYARIKAT SERI PAROI SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[COMPANIES WINDING-UP SUIT NO: D6(D4) 28-354-1992]
11 SEPTEMBER 2003

COMPANY LAW: *Winding-up - Liquidator - Whether liquidators could appoint solicitors to represent them - Whether requirements of rr. 149 and 150 of Companies (Winding-Up) Rules 1972 to be dispensed with - Whether liquidators to be released and company dissolved - Whether books and records of company to be destroyed - Companies Act 1965, ss. 236(1), 239 - Companies (Winding-Up) Rules 1972, rr. 149, 150(1), (2), (5), 152(2)*

This was an application ('encl. 37') by the respondent pursuant to s. 239 of the Companies Act 1965 ('the Act') and r. 150(5) of the Companies (Winding-Up) Rules 1972 ('the Rules') seeking the following prayers: (1) that Messrs Iza Ng Yeoh & Kit be appointed as solicitors to represent the liquidators in this application; (2) that the requirements of rr. 149 and 150 of the Rules be dispensed with; (3) that the liquidators of the respondent company be released and the said respondent company be dissolved pursuant to s. 239 of the Act; and (4) that the books and records of the respondent company be destroyed forthwith. The liquidators averred that upon paying all the costs and expenses of completing the dissolution of the respondent company, they would have no funds to cover the costs of convening separate meetings of the creditors and contributories as required by r. 150(1) and (2) of the Rules.

Held:

[1] Pursuant to s. 236(1) of the Act, a liquidator may with the authority, either of the court or the committee of inspection, appoint an advocate to assist him in his duties. As there was no evidence of any objection to the appointment, there was no reason why Messrs Iza Ng Yeoh & Kit ought not to be appointed as solicitors to represent the liquidators in the present application. (p 420 b-c)

[2] On the facts, this court had no hesitation in dispensing with the requirements of rr. 149 and 150 of the Rules as the liquidators had used all the sums to pay the costs and expenses of finalising the dissolution of the respondent company; thus, prayer (2) of encl. 37 was allowed by virtue of r. 150(5) of the Rules. (p 430 e-f)

[3] Since the property of the said respondent company had been realised without the need of protracting the liquidation, there was no qualms about the two liquidators being released from their role and the respondent company being dissolved pursuant to s. 239 of the Act. (p 431 b-c)

[4] Once the books and records of the respondent company were destroyed by an order of court, no responsibility would rest on the respondent company or the two liquidators, and everything would come to an end. Rule 152(2) of the Rules empowers this court to make an order that the books and records of the respondent company be destroyed forthwith notwithstanding the fact that encl. 37 was filed by the respondent company, and not by the liquidator or official receiver. (p 432 b-c)

[Application allowed.]

Case(s) referred to:
Leon v. York-O-Matic Ltd [1966] 3 All ER 277 ***(refd)***
R v. Lord Mayor of London [1893] 1 QB 146 ***(refd)***
Re Anglo-Maltese Hydraulic Dock Co [1885] 54 LJ Ch 730 ***(refd)***
Re Anglo-Moravian Ry Co [1876] 1 Ch D 130 ***(refd)***
Re Associated Travel, Leisure and Services Ltd [1978] 1 WLR 547 ***(refd)***
Re Consolidated Diesel Engine Manufacturers Ltd [1915] 1 Ch 192 ***(refd)***
Re Continental Fire & Casualty Co [1924] 3 DLR 9 ***(refd)***
Re Cooper's Ltd [1897] 14 TLR 144 ***(refd)***
Re FT Hawkins & Co [1952] Ch 861 ***(refd)***
Re Massey [1870] LR 9 Eq 369 ***(refd)***
Re Meter Cabs Ltd [1911] 2 Ch 557 ***(refd)***
Re Nation Life Insurance Co Ltd [1978] 1 WLR 45 ***(refd)***
Re Pryor [1888] 59 LT 256 ***(refd)***
Re Quality House Pty Ltd [1969] 89 WN (Pt 1) (NSW) 410 ***(refd)***
Re Rapid Road Transit Co [1909] 1 Ch 96 ***(refd)***
Re Salmon [1916] 2 KB 510 ***(refd)***
Re Universal Private Telegraph Co [1870] 23 LT 884 ***(refd)***
Reekie v. Dingwall [1911] SC 808 ***(refd)***
Salton v. New Beeston Cycle Co [1980] 1 Ch 43 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 236(1)(e), (3), (4), 237(1), (2), 239, 284
Companies (Winding-Up) Rules 1972, rr. 149, 150(1), (2), (5), 152(2)

Other source(s) referred to:
Krishnan Arjunan & Low Chee Keong, *Lipton & Herzberg's Understanding Company Law In Malaysia, Student Edition,* pp 445, 446-451

For the respondent applicant - Izabella Elizbieta Halina De Silva; M/s Iza Ng Yeoh & Kit

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Summons In Chambers In Encl. 37

This was an application by the respondent known as Syarikat Seri Paroi Sdn Bhd pursuant to s. 239 of the Companies Act 1965 and r. 150(5) of the Companies (Winding-Up) Rules 1972 seeking the following prayers:

(1) that Messrs Iza Ng Yeoh & Kit be appointed as solicitors to represent the liquidators in this application;

(2) that the requirements of rr. 149 and 150 of the Companies (Winding-Up) Rules 1972 be dispensed with;

(3) that Abdul Jabbar bin Abdul Majid and Ng Kim Tuck be released as liquidators of Syarikat Seri Paroi Sdn Bhd ("the said respondent company") and that the said respondent company be dissolved pursuant to s. 239 of the Companies Act 1965; and

(4) that the books and the records of the respondent company be destroyed forthwith.

The grounds for filing the application in encl. 37 were amply set out in the supporting affidavit of Ng Kim Tuck that was affirmed on 1 April 2003 as seen in encl. 37. Of importance would be the fact that the liquidators have no funds to cover the costs of convening separate meetings of creditors and contributories as required by rr. 150(1) and 150(2) of the Companies (Winding-Up) Rules 1972.

Now, the business of the respondent company was to develop a housing estate known as Taman Seri Paroi which consisted of 26 units of one storey low cost units, 25 units of one storey terrace houses and 30 units of 1 1/2 storey terrace houses (hereinafter referred to as "the project") on land held under 85 sub-divided titles known as HS (D) 26633 PT No: 2809 to HS (D) 26717 PT No. 2893. The sub-divided titles were charged to the petitioner. The project comprised of 85 sub-divided titles of land and three pieces of that land were surrendered to the State Government. In regard to the remainder of the 82 pieces of land, 81 houses were constructed therein whereas only one house was constructed on two pieces of land. All these houses have been sold.

The project hit a snag. It was initially abandoned. Later, it was successfully completed with funding under the auspices of Bank Negara's Tabung Projek Perumahan Terbengkalai ("TPPT"). Under the TPPT scheme, a soft loan was obtained from the petitioner on 6 June 1994 in the sum of RM2.9 million for the purpose of completing the project. Certificates of fitness were duly obtained from the Majlis Perbandaran Seremban on 15 June 1995. Upon full payment of the purchase price and vacant possession surrendered, all the titles to the houses were handed to the purchasers. On 26 July 2000, the liquidators made an application to TPPT to accept RM2.7 million as repayment of the soft loan of RM2.9 million. TPPT magnanimously agreed to the liquidators' request and was willing to absorb the deficit of RM200,000. The liquidator have been and are still using the said deficit sum to pay the costs and expenses of liquidation. As at 31 October 2002 there was still a sum of RM76,617.53 left in the liquidators' bank account and this sum will be used to pay for the costs and expenses of completing the dissolution of the respondent company. After having paid all the costs and expenses, there will be no funds left in the hands of the liquidators for distribution to the respondent company's creditors and contributories. Ng Kim Tuck averred that the liquidators have completed their duties and so they wish to be released as the liquidators for the respondent company. The liquidators too desire that the respondent company be dissolved pursuant to s. 239 of the Companies Act 1985 and that the books and records of the respondent company be destroyed accordingly.

This was not an ordinary case. It was not the run of the mill type of cases. Ng Kim Tuck in his supporting affidavit averred to the following state of facts:

(1) that the liquidators were unable to comply with rr. 149, 150(1) and 150(2) of the Companies (Winding-Up) Rules 1972 in that the liquidators were unable to give the relevant notices in Form 75 to all the creditors who have proved their debts and to all the contributories that the liquidators intend to make an application under Form 76 for their release as liquidators

and the liquidators too were unable to append together with those notices the summary of all the receipts and payments in the winding up in Form 77;

(2) that the liquidators would have to, thereafter, seek the approval of the creditors and contributories by way of ordinary resolutions in separate meetings before their resignation and/or discharge can be effected; and

(3) that based upon the list of purchasers to whom the respondent company owe the liquidated and ascertained damages, there were at least 51 unsecured creditors and the convening of the separate meetings of creditors and contributories would incur unnecessary costs which the liquidators will not be able to pay because they have no available funds in their hands.

For all these reasons, Ng Kim Tuck craved the indulgence of this court to dispense with compliance of rr. 149 and 150 of the Companies (Winding-Up) Rules 1972. Ng Kim Tuck too averred that if the liquidators were to hold the records of the respondent company in their hands for the next six years they would incur costs and so the liquidators seek an order that those records may be destroyed forthwith because their useful life span no longer exist bearing in mind that the project was completed in 1995. Ng Kim Tuck then craved for an order in terms of encl. 37.

Analysis

Messrs Iza Ng Yeoh & Kit, a well known firm of advocates & solicitors, filed the application in encl. 37 on behalf of the liquidators. That, to my mind, was a perfectly correct procedure to adopt. Legal practitioners know, for certain, that the winding up of a company involves a considerable amount of work to be done and such work is both technical and legal in nature. It entails a certain measure of professionalism. The nature of the work includes conveyancing, taking and defending proceedings, making the necessary applications to court and conducting examinations of directors, officers and other relevant persons. Almost always the liquidator is not trained in law and so he is entitled to appoint an advocate & solicitor to assist him in discharging his duties. The right to appoint an advocate & solicitor does not and should not deprive the liquidator nor relieve him of his function and duty of conducting the winding up. The court in *Reekie v. Dingwall* [1911] SC 808, at 809 and 815, aptly drew the relationship between a liquidator and a solicitor in this way:

> … in some quarters neither understood nor appreciated, and solicitors sometimes act much more as if they were in charge of the liquidation, employing an accountant in the person of the liquidator to assist them, than themselves employed, as occasion requires, by their client, the liquidator ... . It is the liquidator's duty to perform the business of the liquidation himself and only to employ the solicitor in such matters as bring him into contact with the court, in matters which involve conveyancing, and in such other matters as justify himself in obtaining legal advice for his guidance. The solicitor properly comes on the scene only when his client, the liquidator, requires assistance, and to that end instructs him. He is not entitled to do work on his own initiative.

In Australia, the liquidator requires no sanction nor approval for the appointment of a solicitor. The position is different in England (*Re Associated Travel, Leisure and Services Ltd* [1978] 1 WLR 547) and extreme care must be exercised when the liquidator is making his choice. The liquidator should avoid selecting someone to whom he knows that the committee of inspection or the creditors or the contributories would object strenuously (*Re Cooper's Ltd* [1897] 14 TLR 144; and *Re Consolidated Diesel Engine Manufacturers Ltd* [1915] 1 Ch 192). The liquidator must also avoid appointing a solicitor whose independence may be affected by reason of that solicitor being the employer to the member of the committee of inspection (*Re F.T. Hawkins & Co* [1952] Ch. 861). A solicitor who is the partner of the liquidator should also not be appointed (*Re Universal Private Telegraph Co* [1870] 23 LT 884). According to the case of *Re Continental Fire & Casualty Co.* [1924] 3 DLR 9, the liquidator may change his solicitor at any time. But it must be borne in mind that according to the case of *R. v. Lord Mayor of London* [1893] 1 QB 146, a solicitor's retainer is quite permanent in that it will not be affected by the removal of the liquidator himself.

For professional services rendered, the solicitor is entitled to be paid for work done in the course of winding up (*Re Pryor* [1888] 59 LT 256). But the solicitor must look for his payment of his professional fees to the assets of the company and not to the liquidator personally (*Re Anglo-Moravian Ry. Co* [1876] 1 Ch.D. 130; and *Re Nation Life Insurance Co. Ltd* [1978] 1 WLR 45 at 47). It must be emphasised that the solicitor is entitled to have his costs paid in priority to other claims (*Re Massey* [1870] LR 9 Eq. 369). And at the request of the liquidator, the solicitor is bound to submit his bill of costs for taxation (*Re Quality House Pty Ltd* [1969] 89 WN (Pt. 1) (NSW) 410; and *Re Nation Life Insurance Co. Ltd (supra)*). The cases of *Re Anglo-Maltese Hydraulic Dock Co* [1885] 54 LJ Ch 730; *Re Rapid Road Transit Co.* [1909] 1 Ch. 96; and *Re Meter Cabs Ltd* [1911] 2 Ch 557 lay down the following principles of law. That a solicitor is given a lien to the moneys and documents

of the company which came into his possession prior to the liquidation but not in respect to those moneys and documents which he acquired in the course of the winding up.

Statutory wise, the power of a liquidator to employ an advocate is now governed by s. 236(1)(e) of the Companies Act 1965 which enacts as follows:

> 236(1) The liquidator may with the authority either of the Court or of the committee of inspection.
>
> (e) appoint an advocate to assist him in his duties.

There is no evidence that the appointment of Messrs Iza Ng Yeoh & Kit is objected to by anyone. Of course, the liquidators are not justified in obtaining on an *ex parte* basis the appointment of an advocate & solicitor whom they know that the committee of inspection or the creditors or the contributories would object. But if the liquidator thinks that the decision of either the committee of inspection or the creditors or the contributories is unwise, then the liquidator has the power under s. 237 of the Companies Act 1965 to override them (*Re Consolidated Diesel Engine Manufacturers* [1915] 1 Ch. 192; and *Re Jamnadas Nursey Ginning and Pressing Co.* [1935] AIR (Bom.) 337). A classic example would be the case of *Re North Eastern Insurance Co.* [1916] 85 LJ Ch. 751 where the liquidator was desirous of making a call against the wishes of the committee of inspection and Sargant J ruled that the court has an inherent and original jurisdiction to override the committee's decision and that the creditors' claims have first consideration in case of any calls. It would not be out of place to reproduce in verbatim s. 237 of the Companies Act 1965 and I must do so now:

> 237 Exercise and control of liquidator's powers
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> (1) Subject to this Part the liquidator shall in the administration of the assets of the company and in the distribution thereof among its creditors have regard to any directions given by resolution of the creditors or contributories at any general meeting or by the committee of inspection, and any directions so given by the creditors or contributories shall in case of conflict override any directions given by the committee of inspection.
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> (2) The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he shall summon meetings at such times as the creditors or contributories by resolution direct or whenever requested in writing to do so by not less than one-tenth in value of the creditors or contributories.
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> (3) The liquidator may apply to the Court for directions in relation to any particular matter arising under the winding up.

(4) Subject to this part the liquidator shall use his own discretion in the management of the affairs and property of the company and the distribution of its assets.

It is clear that s. 237(1) of the Companies Act 1965 gives the directions of creditors or contributories to override that of the committee of inspection. But it is still unclear whether the power authorised by the committee of inspection under s. 236(1) of the Companies Act 1965 can be overridden (*Re Salmon* [1916] 2 KB 510). At any rate, the liquidator is quite independent in that it is merely required to take note of directions and not to follow them at will (*Leon v. York-O-Matic Ltd* [1966] 3 All ER 277). Moreover, s. 236(4) of the Companies Act 1965 allows the liquidator to use his own discretion. It is prudent, however, for the liquidator to apply for directions to the court under s. 237(3) of the Companies Act 1965 in relation to any particular matter that arise under the winding up. In regard to the requisition of meetings, it is clear that under s. 237(2) of the Companies Act 1965 ten percent in value of the creditors or contributories may apply in writing in order to requisition general meetings. It seems that even an individual may proceed to apply to the court under s. 236(3) of the Companies Act 1965 in connection with the exercise or the proposed exercise of those powers vested in the liquidator.

I gratefully adopt the passages that appear in a book entitled *"Lipton & Herzberg's Understanding Company Law In Malaysia, Student Edition"* by Krishnan Arjunan and Low Chee Keong. There the learned authors wrote at p. 445 to p. 446:

(4) Powers of the liquidator

In Chapters 5 and 12 above, it was seen that the board of directors and the general meeting of members are regarded as the two principal organs of a company. When a company is placed in liquidation, the liquidator replaces the board of directors as an organ of the company and assumes all the powers of the board: *Re Crest Realty Pty Ltd (No 2)* [1977] 1 NSWLR 664, and *Hillman v. Crystal Bowl Amusements Ltd* [1973] 1 WLR 162.

Because liquidators are also regarded as agents of the company, their actions bind the company. This includes the power to appoint an attorney to execute a transfer of the property of the company on behalf of the company and the liquidator: *Australian Guarantee Corp Ltd v. Registrar of Titles* [1992] 7 ACSR 577. Like other agents, liquidators are generally not personally liable for contracts made on behalf of the company.

Apart from the liquidator's powers as an agent, the Act sets out additional powers of liquidators. In the case of a compulsory winding up, a liquidator has the powers granted by s. 236. In addition, under s. 252 and the Companies (Winding Up) Rules 1972, certain powers of the court are delegated to the liquidator.

A liquidator's powers under s. 236 include the following:

- to carry on the business of the company so far as is necessary for the beneficial winding up of that business;
- subject to the priorities set out in s. 292, to pay any class of creditors in full;
- to make compromises with creditors and contributories with respect to their claims and liabilities;
- to bring or defend legal proceedings in the name of the company and to appoint a solicitor to assist;
- to sell or otherwise dispose of all or any part of the company's property;
- to sign documents on the company's behalf and use its common seal for that purpose;
- to appoint an agent to do any business that the liquidator is unable to do, or that it is unreasonable to expect the liquidator to do in person; and
- to do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

Liquidators exercise these powers by authority of the court, but s. 237(1) requires them to have regard to any directions given by the creditors, contributories or by a committee of inspection comprising representatives of creditors and members. Liquidators are not, however, bound by these directions since s. 237(4) allows them to use their own discretion in the management of the affairs and property of the company and distribution of its assets. Section 237(3) enables liquidators to apply to the court for directions in relation to any particular matter arising under the winding up.

Section 252 delegates certain powers which are personal to the liquidator and may not be delegated: *Re Chemical Plastics Ltd* [1959] VR 570. These include powers with respect to:

- holding and conducting meetings to ascertain the wishes of creditors and contributories: s. 237;
- settling the lists of contributories, rectifying the register of members where required and the collecting and applying the assets: s. 244;
- the paying, delivery, conveyance, surrender or transfer of money, property or books to the liquidator: s. 245;

– making calls and adjusting the rights of contributories: s. 247. This is subject to the limitations imposed being that the liquidator may not make any call without special leave of court or the sanction of the committee of inspection, and that he or she may not rectify the register of members without the special leave of court; and

– fixing a time within which debts and claims must be proved.

In the case of a voluntary winding up, s. 269 authorises the liquidator to exercise any of the powers given by s. 236 to a liquidator appointed in a compulsory winding up. However, in the case of a members' voluntary winding up, the exercise of these powers is subject to the approval of a special resolution of the general meeting of members. In a creditors' voluntary winding up, the liquidator must obtain the approval of the court, the committee of inspection, or the creditors, to exercise the powers in s. 236. In addition, s. 274(1) enables the liquidator, or any contributory or creditor, to apply to the court to exercise all or any of the powers that the court might exercise in a compulsory liquidation. This is granted if the court is satisfied that the exercise of the power will be just and beneficial: s. 274(2). In this way a liquidator in a voluntary winding up may exercise the delegated powers of a liquidator appointed in a compulsory liquidation.

Under s. 277(5), a liquidator may apply to the court for orders requiring certain persons to hand over books and records to which the company is prima facie entitled. Such persons include the company's bankers, receiver or agent. However, according to *Re High Crest Motors* [1978] 3 ACLR 564, these provisions do not oblige a receiver and manager to hand over the company's books until the receivership is completed. It is only then that the company's *prima facie* entitlement arises. In some situations this may mean that a liquidator will not have information vital to challenging the validity of a charge or the receiver and manager's appointment until it is too late.

The learned authors further wrote at p. 446 to p. 451:

(5) Duties of liquidators

(a) General duties

It was noted earlier that a liquidator is regarded as an agent of the company. This agency relationship imposes fiduciary duties and duties of care upon him or her. These duties are similar to the duties imposed on directors of the company discussed in Chapter 13 above. Indeed, s. 4(1) includes a liquidator of a company appointed in a members' voluntary winding up in the definition of 'officer'.

The liquidator's obligations are, because of the nature of the position, wider and more strict than the duties imposed upon the replaced directors. In *Re Partridge* [1961] SR (NSW) 622, the court described the general duties imposed on a liquidator:

> Speaking generally, the liquidator's principal duties are to take possession of and protect the assets, to make lists of contributories, to have disputed cases adjudicated upon, to realise the assets and to apply the proceeds in due course of administration amongst the creditors and contributories.

Whilst s. 237(4) permits liquidators to use their own discretion in the management of the affairs and property of the company and the distribution of its property, they are nevertheless under a fiduciary duty to act honestly and to exercise a reasonable degree of care and diligence.

A liquidator is also required to act impartially in the conduct of the winding up and comply with the provisions of the Act. If difficulties arise, the liquidator is under a duty to seek the directions of the court: s. 237(3).

In *Commissioner for Corporate Affairs v. Harvey* [1980] VR 669, a liquidator was found to have been in breach of his duties in a large number of respects. He failed to deposit the company's money in the liquidation trust account and to lodge accounts with the Commission. He dishonestly used the company's funds to make unauthorised payments to his firm. In some instances he used the company's funds for personal expenses unconnected with the liquidation. The court also found that Harvey delegated his powers to unsupervised employees and failed to seek the court's directions on controversial issues. He generally failed to act in the interests of the company, its contributories or creditors. The court ordered that Harvey make up the deficiency of two insolvent companies he was liquidating. Marks J explained the general duties of a liquidator appointed in a compulsory winding up in the following terms:

> The duties of the liquidator need to be clearly understood. Fundamentally, he must administer the estate strictly in accordance with the duties and obligations specifically imposed on him by the Companies Act and its Rules. It is obvious that everything to be done in a competent administration is not and cannot be specifically prescribed. Preserving the assets, giving proper attention to the administration, acting with due despatch and ensuring adequate knowledge and understanding of the affairs of the companies are matters of commonsense. If there is a difficulty at any state of the administration then it is the clear duty of the liquidator to inform the court and take directions.

> In a compulsory winding up his office stems from appointment by the court. He is clearly not an employee of the court but the nature of the appointment makes him a representative of it. As Street J said in *Duffy v. Super Centre Development Corp Ltd* [1967] 1 NSWR 382 at 383, the decisions the liquidator makes from time-to-time are in effect made under the authority of the court itself. The winding up is by the court which for the purposes the liquidator is. As such he is entrusted with the reputation of the court for impartial and proper despatch of duties. No lesser standard in that regard is to be expected of the liquidator than of a court or a judge.
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> When a winding up occurs, the financial outcome for creditors and contributories is dependent, amongst other things, on honest administration. It is the trust which those persons are obliged to place in the liquidator to preserve the assets and act faithfully and fairly that defines the weight of the duties owed and the strictness with which his conduct must be considered by the court.
>
> The law in the circumstances regards such duties as fiduciary although clearly it will not interfere with *bona fide* exercise of discretions which are not beyond the acts or omissions of a reasonable man.'

In *Re Ah Toy* [1986] 4 ACLC 480, the Supreme Court of the Northern Territory considered whether a provisional liquidator was liable under the Australian Uniform Companies Act equivalent of s. 277 to make good losses caused by his negligent management of the liquidation. A partner of Price Waterhouse in the Northern Territory advised the company's shareholders that it should be placed in liquidation. The partner arranged for Ah Toy, an official liquidator, to be appointed as the company's provisional liquidator on the basis that Price Waterhouse did most of the work. The company was subsequently placed in liquidation and Ah Toy was nominated as its liquidator. Ah Toy accepted and appointed Price Waterhouse as his agent. Major decisions and most of the liquidation work was done without Ah Toy's involvement.

The court held that Ah Toy did not have power to appoint Price Waterhouse as his agent in the way in which he had done. While provisions such as the then Australian equivalent of s. 236(2)(i) permitted a liquidator to appoint agents, it did not authorise 'wholesale delegation'. Liquidators are appointed on the strength of their personal qualifications and are personally accountable for their work. Toohey, Morling and Wilcox JJ in joint judgment stated that 'in their work they must rely to some extent upon others but it is important that they bring their personal skills and experience to all significant aspects of the liquidation.'

In *Re Allebart Pty Ltd* [1971] 1 NSWLR 24, Street J commented on the interrelationship between the liquidator's duty to investigate the affairs of the company and the duty to act impartially. In that case, one of the creditors of an insolvent company in the process of compulsory winding up, provided the liquidator with funds to investigate the conduct of the company's officers. Street J held that this was permitted since in some situations this money may be all a liquidator has available. However, a liquidator must ensure that his independence is not compromised.

> A court winding up involves more than a mere realisation of the assets and distribution of proceeds. The official liquidator is an officer of the court, and as such he has public responsibilities to investigate past activities connected with the company, and, in appropriate cases, to initiate such further proceedings, civil or criminal, connected therewith as the circumstances may dictate. It is his duty to discover not only breaches of the Companies Act, but also conduct falling short of the requisite standards of commercial morality. In every instance the winding up of an insolvent company pursuant to an order of the court is attended with these obligations resting upon the official liquidator. The due course of such a winding up involves his taking such steps in relation thereto as are necessary to discharge the duties and obligations resting upon him … I have already stated my view that in no degree or in no respect is the conduct of the petitioner in the present winding up open to legitimate criticism. It has, quite justifiably, urged on the official liquidator and made funds available to him. This involves, however, the ever-present risk that the liquidator may either yield or appear to yield to partisan considerations in submitting to the urgings of a creditor in conjunction with accepting financial assistance from a creditor. A liquidator is bound to be on guard lest he compromise his position of independence and impartiality in all respects in the discharge of his functions as an officer of the court administering the winding up of a company. Not only is it his prerogative to decide what steps should be taken, but it is his duty to exercise himself, according to the dictates of his own opinions, what should and what should not be done in the course of any given winding up. It is for him to decide what steps are to be taken, and when, how and by what means such steps are to be taken. Where he draws upon financial assistance from a creditor, it is incumbent upon him to ensure that he does not place in jeopardy his independence in the discharge of his duties. It is indispensable that in point of substance the liquidator's independence should be preserved; and it is undesirable that a liquidator should permit a situation to develop in which it might appear that he has yielded up in any degree whatever his exclusive independent control in the decision-making processes and administration of a winding up.

Section 292(9) provides an incentive to creditors to give financial assistance to liquidators to pursue asset recovery proceedings. Such proceedings may include the recovery of voidable preferences from particular creditors or proceedings against directors for breach of fiduciary duty. Where creditors provide such assistance the liquidator may apply to the court for an order that the contributing creditors receive a higher dividend from the company's assets than they would otherwise be entitled. For example, in *Re Kyra Nominees Pty Ltd* [1987] 5 ACLC 811, the court ordered that creditors who contributed to a 'fighting fund' receive a dividend three times greater than that of all other unsecured creditors.

As discussed above, a person appointed to act as liquidator must be an approved liquidator where it is a winding up by the court. In order to attain registration, liquidators must possess certain qualifications and experience. In view of this fact, the standard of care and diligence of a liquidator is at least the standard of a qualified and experienced liquidator. This is obviously a higher standard than that imposed on directors: *Re City Equitable Fire Insurance Co Ltd* [1925] 1 Ch 407.

(b) Specific duties of liquidators

Proper Administration

One of the first tasks of a liquidator is to open a bank account, known as the liquidator's general account, into which money received by the liquidator is deposited. A separate account is required for each company under liquidation. In the case of a compulsory liquidation, the court's order specifies the particular branch of a bank where the account is to be kept. A liquidator who merely deposits money received into his firm's general trust account is regarded as being in breach of this duty: *Commissioner for Corporate Affairs v. Harvey* [1980] VR 669.

Liquidators must notify the registrar and the official receiver of their appointment within 14 days: s. 280.

A liquidator is also under a duty to maintain a proper record of the winding up. Such records include:

– books recording minutes of meetings of contributories and creditors: s 277; and

– accounts in the prescribed form: Companies Regulations, Sch 2, Form 75, which must be prepared every six months and lodged with the Registrar and Official Receiver: s. 281. These half-yearly accounts must show the liquidator's receipts and payments during the period and in the case of the second and subsequent accounts must also show the aggregate amount of receipts and payments during the whole period since

the liquidator's appointment. A copy of these accounts should be kept at the liquidator's office and made available for inspection by interested parties.

Collect the company's assets

As soon as practicable after appointment, a liquidator is required to take into custody or control all the property to which the company is or appears to be entitled: s. 233. In certain circumstances the liquidator can take legal action to recover property which the company disposed of before the commencement of winding up. The assets available for recovery are considered separately below. In addition, the liquidator can take action on the company's behalf to recover property, profits or damages from directors or other officers who breached their duties to it prior to the commencement of winding up. The duties of directors and the company's remedies for breach of those duties are discussed in Chapter 13 above.

The company's assets also include the amounts which contributories are liable to contribute on a winding up. Under s. 214 the holder of partly paid shares is liable to contribute the amount unpaid to the company when it is wound up. Persons who have ceased to be members within one year of the commencement of winding up are also liable to contribute to the property of the company where the existing members are unable to satisfy the full extent of their liabilities. However, past members are not liable for the company's debts incurred after they ceased to be members.

Preserve assets

A liquidator is also under a duty to preserve the company's assets until they can be realised. To achieve this end, a liquidator is permitted to carry on the business of the company: s 236(1)(a). This is especially important if this is the only means of preserving the goodwill of a company's business where the liquidator intends to sell the business as a going concern. The business can only be carried on for the purpose of a beneficial winding up and not with a view to its continuance: *Re Wreck Recovery & Salvage Co* [1880] 15 Ch D 353.

In some instances, the property of a company may be unsaleable or may subject the company to onerous obligations. For example, if the company has leased a building where it carried on business, the lease may oblige it to continue to pay rent after the business has ceased. Accordingly, in order to preserve the remaining assets of the company, s. 296 enables the liquidator to disclaim the lease or other onerous obligations on behalf of the company. This power may only be exercised within 12 months after the commencement of the winding up. This disclaimer operates to terminate the rights, interests and liabilities of the company as from the date of disclaimer. However, all

liabilities arising up to the date of commencement of winding up remain and rank with other debts of equal priority. A liquidator may also disclaim shares owned by the company or unprofitable contracts.

Realise assets

Because the purpose of a winding up is to distribute the company's assets to creditors and contributories, the liquidator is under a duty to realise the company's assets. To this end, the liquidator is given powers to sell all the company's property and to execute documents in its name: s. 236. The liquidator, in exercising these powers is under a duty to obtain the best possible price for the property. A company's property does not always have to be sold in a winding up. For example, the members may resolve to wind up a solvent company voluntarily for the sole purpose of dividing up its unrealised assets among themselves.

Distribute assets

Liquidators are also under a duty to repay the company's debts and to distribute any surplus assets amongst contributories. These duties are considered below.

Acquaintance with company's affairs

In order for liquidators to collect and preserve the assets of the company, they are required to acquaint themselves with the affairs of the company. Their sources of information are the company's records, the company's officers and employees. In a compulsory liquidation, s. 234(1) requires persons who were the directors and secretary at the time of the winding up order to submit a report to the liquidator in the prescribed form as to the affairs of the company. This report must be submitted not later than 14 days after the making of the winding up order unless otherwise extended: s. 234(3). Under s. 234(2), present or former officers, and persons who have taken part in the formation of the company within a year of the date of the winding up order, may also be required to supply information on the affairs of the company if requested by the liquidator.

Report of breaches of the Act

Where it appears to a liquidator that certain persons connected with a company are guilty of offences in relation to it or are guilty of fraud and concealment of material facts and other such matters which in his or her opinion are desirable to be brought up, for example, breach of duty or breach of trust, the liquidator is obliged under s. 235 to report the matter to the court.

Effect (of) dissolution

After the company's property has been realised and distributed to creditors and members, a liquidator may apply to the court for an order that he or she be released and that the company be dissolved: s. 239. From the date of the order the company is dissolved: s. 240. Within one month of ceasing to act as liquidator, he or she must lodge with the Registrar and the Official Receiver an account of the conduct of the liquidation explaining how the company's property has been distributed: s. 281.

All these passages are certainly thought provoking and they should be applied to the facts of the present case. I see no reason why Messrs Iza Ng Yeoh & Kit ought not to be appointed as the solicitors to represent the liquidators in the present application in encl. 37 and I accordingly made an order to that effect. In short, I allowed prayer (1) of encl. 37.

The liquidators here have done their job. The project had succeeded with the assistance of TPPT. All the houses have been sold and the certificates of fitness have been issued. Even the full purchase price of all the houses have been paid and the purchasers must be very happy and contented because vacant possession have been given to them. With the concurrence of TPPT, the liquidators have paid RM2.7 million by way of a repayment of the soft loan of RM2.9 million. TPPT was willing to absorb the deficit of RM200,000. What was left in the kitty was the sum of RM76,617.53 as at 31 October 2002 and the liquidators used these sums to pay the costs and expenses of finalising the dissolution of the respondent company. At the end of the day, there was nothing left and it was for these reasons that the respondent filed encl. 37. I have no hesitation to dispense with the requirements of rr. 149 and 150 of the Companies (Winding-Up) Rules 1972 on the facts of the present case. I would allow prayer (2) of encl. 37 by virtue of r. 150(5) of the Companies (Winding-Up) Rules 1972.

Both the liquidators are anxious that they be released as the liquidators for the said respondent company and that the latter be dissolved. Section 239 of the Companies Act 1965 enacts as follows:

239. When the liquidator:

(a) has realised all the property of the company or so much thereof as can in his opinion be realised without needlessly protracting the liquidation, and has distributed a final dividend, if any, to the creditors and adjusted the rights of the contributories among themselves and made a final return, if any, to the contributories; or

(b) has resigned or has been removed from his office, he may apply to the Court:

(c) for an order that he be released; or

(d) for an order that he be released and that the company be dissolved.

And factually speaking, the property of the said respondent company has been realised without the need of protracting the liquidation and the two liquidators now want to be released from their role and they too want the respondent company to be dissolved. I have no qualms in granting these two prayers as phrased and framed in prayer (3) of encl. 37. Once the respondent company is dissolved, the company is no longer in existence (*Salton v. New Beeston Cycle Co* [1980] 1 Ch 43).

In regard to prayer (4) of encl. 37, I must refer to s. 284 of the Companies Act 1965. That section enacts as follows:

> 284 (1) Where a company is being wound up all books and papers of the company and of the liquidator that are relevant to the affairs of the company at or subsequent to the commencement of the winding up of the company shall as between the contributories of the company be prima facie evidence of the truth of all matters purporting to be therein recorded.
>
> (2) When a company has been wound up the liquidator shall retain the books and papers referred to in subsection (1) for a period of five years from the date of dissolution of the company and at the expiration of that period may destroy them.
>
> Penalty: Two thousand ringgit.
>
> (3) Notwithstanding subsection (2), when a company has been wound up the books and papers referred to in subsection (1) may be destroyed within a period of five years after the dissolution of the company:
>
> (a) in the case of a winding up by the Court, in accordance with the directions of the Court;
>
> (b) in the case of a members' voluntary winding up, as the company by resolution directs; and
>
> (c) in the case of a creditors' voluntary winding up, as the committee of inspection, or, if there is no such committee, as the creditors of the company direct.

(4) No responsibility shall rest on the company or the liquidator by reason of any such book or paper not being forthcoming to any person claiming to be interested therein if the book or paper has been destroyed in accordance with this section.

Once the books and the records of the respondent company have been destroyed by an order of this court, no responsibility shall rest on the respondent company or the two liquidators. Everything comes to an end. Rule 152(2) of the Companies (Winding-Up) Rules 1972 empowers this court to make an order that the books and the records of the respondent company be destroyed forthwith notwithstanding the fact that encl. 37 was filed by the respondent company and not by the liquidator or the official receiver.

Conclusion

For the reasons as adumbrated above, I allowed prayers (1), (2), (3), and (4) of encl. 37.